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May 2, 2013

Hon. Kiyo A. Matsumoto
United States District Court
Eastern District of New York
225 Camden Plaza East,
Room S905
Brooklyn, NY 11201

Re: Innovation Ventures, LLC, et al. v. Ultimate One Distributing Corp., et al.;
USDC Eastern District of New York, Case No. 1:12-CV-5354-KAM-RLM

Dear Judge Matsumoto:

The undersigned attorneys represent Defendants and Crossdefendants Leslie Roman, Donna Roman and Flexopack in the above designated case. This letter is sent in accord with Section IV B of the Court's Chambers Practices. Defendant and Crossdefendant Leslie Roman seeks to file a motion pursuant to Federal Rule of Civil Procedure 12(b)(6) striking Counts I, II and III of the First Amended Cross-Claims brought by Midwest Wholesale Distributors, Inc., Walid Jamil aka Wally Jamil, Justin Shayota, Raid Jamil aka Brian Jamil, JT Wholesale, Inc., and Trimexico, Inc. (collectively the "Midwest Crossclaimants") against Leslie Roman. The contested Cross-Claims are found at pages 42 through 46 of the Midwest Cross-Claimants' First Amended Answer to Plaintiff's Seventh Amended Complaint (Docket No. 499). Counts I, II and III of the Cross-Claims fail to state a claim upon which relief may be granted.

Basis for the Motion

Counts I and III of the Midwest Cross-Claims against Leslie Roman allege fraud. Count II alleges "innocent misrepresentation," which is a misrepresentation of fact, similar to fraud, but negligently made, without fraudulent intent. The "facts" alleged to support Counts I, II and III are at Paragraph 19 of the First Amended Cross-Claim (Page 44 of Docket No. 499) alleging that:

- "c. Roman and One Stop Label represented that he or One Stop made official 5 Hour labels and boxes; and
- d. Roman represented that Romero was an authorized 5 Hour packer."

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It is ambiguous as to whether Crossdefendant Roman communicated orally, in person or by telephone, or by written or electronic correspondence in making these alleged representations. It is ambiguous as to how and when these alleged communications were received. It is ambiguous whether the alleged false representations were made simultaneously with or separately from communications made by Crossdefendant One Stop Label, and unclear whether the subject of the alleged representations was in fact Roman or One Stop Label. There are no dates, times or locations for the making or receiving of the alleged communications.

Rule 9(b) of the Federal Rules of Civil Procedure states in pertinent part: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

Rule 9(b) essentially requires plaintiffs to allege the who, what, when, where, and how elements to state a claim arising in fraud. *See, In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1423 (3d Cir. 1997). This elevated pleading standard also applies to alleged negligent misrepresentations. *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566,583 (2nd Cir. 2005).

The Midwest Crossclaimants' First Amended Cross-Claim provides no particular facts or circumstances as to the representations constituting fraud and/or innocent misrepresentation. The Midwest Crossclaimants' Cross-Claims do not state who actually made the false representations, what was specifically represented, whether the representations were written or oral, or when and where the representations were made.

The parties have conferred orally and in writing and have not been able to resolve the issue that is the subject of the requested Motion.

Proposed Briefing Schedule

Defendant and Crossdefendant Leslie Roman proposes the following briefing schedule in connection with the anticipated motion:

Motion and Moving Papers filed by:	May 10, 2013
Response filed by:	May 30, 2013

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We look forward to receiving a date and time for a pre-motion conference. We request that the Court hold the conference by telephone conference call.

Thank you for your consideration.

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By Gordon J. Zuiderweg
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Defendants and Crossdefendants Leslie Roman, Donna
Roman and Flexopack

cc: Anthony Paesano (via email and ECF)
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